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## Civilizing the Natives: Marriage in Post-Apartheid South Africa

**S**OUTH AFRICA IS A LAND OF MANY CULTURES. For several hundred years, British and Afrikaaner whites controlled the country, systematically manipulating black people to the whites' advantage. For the most part, however, whites tolerated the continuation within black communities of traditional marriage practices that white Christians considered uncivilized. In 1994, South Africa changed governments. A black majority Parliament came to power, adopting a constitution dedicated to equality and human dignity. Four years later, Parliament adopted a new marriage law that, though permitting some of the external trappings of the traditional marriage system to continue, eliminated by law much of the core of its male-centered rules.

From the point of view of the legislators who voted for it, the new law was required in order to promote gender equality under the new constitution. From the point of view of traditional leaders and some other rural dwellers, the new law was unjustifiable because it failed to honor black people's traditions in a new black South Africa. This essay is about points of view—the multiple points of view of South Africans, and the point of view of one admiring American, who is trying to understand.

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*This essay is part of a forthcoming volume, The Free Exercise of Culture, edited by R. Shweder, M. Minow, and H. Markus. © Russell Sage Foundation. All rights reserved.*

## THE CUSTOMARY RULES AND PRACTICES

About 78 percent of South Africa's population is black, about 12 percent is white, and the rest is primarily Indian or of mixed race, called "coloured." Nearly half of all black Africans still live in rural areas, the great majority in traditional groups headed by hereditary kings or chiefs and by headmen and subchiefs. The largest of these groups are the Zulu, the Xhosa, the Pedi, the Sotho, the Tswana, the Tsonga, and the Swazi. All are hierarchically organized, and, in nearly all, only men can be chiefs or senior counselors.

Each of these cultural groups has its own customs and rules—rituals and practices at birth, at the coming of age, at marriage, and at death. Indeed, within each group are subgroups with their own variations. The customary rules are not unalterable. Though certain common patterns persist through time, the actual content of rules—the so-called customary law—is revealed at any given time through the practices of the people who live by them, and practices change with changing conditions. Whether these practices are appropriately regarded as "law" is debatable, for they have no definitive textual form and are modified over time by the actions of those who adhere to them.<sup>1</sup> Still, Africans of all sorts speak as if these practices were "law," and, as we will see, South Africa's new constitution itself directs courts to apply "customary law" in appropriate circumstances. The chiefs, of course, also believe in customary laws and consider themselves the authoritative voice of their content. They or other senior leaders preside over local customary courts where they apply their view of the "law" to resolve disputes. Most black South Africans who live in rural areas follow customary practices in their daily lives. For them, the chiefs still play central roles as the keepers and promoters of traditions and as political leaders. In last year's parliamentary elections, for example, the presidential candidates of all the major national political parties courted the traditional chiefs because they believed that the chiefs could deliver large numbers of votes.

During the years of white rule, the only sort of coupling relationship denominated as "marriage" by law was the form

of Christian or civil marriage that white people practiced. The rules for entry into civil marriage and the legal consequences of it are similar to those in the United States. After changes in the law that were completed only in the 1980s,<sup>2</sup> women in civil marriage have full legal capacity to enter into contracts and to hold property in their own names. Neither husband nor wife can marry any other person while they are still married to each other. And they can exit from the marriage only by securing a divorce through a court that applies community property rules to divide their assets, determines whether one should make additional periodic payments to the other in the form of alimony, and decides who will have custody of their children.

During the twentieth century, black South Africans who wished to marry had a choice. They could marry under civil law, and indeed, by the mid-twentieth century, many black Christians did so. (Most blacks who married under civil law also observed some customary marriage rituals as well.) The remaining black South Africans, probably close to a majority even today, marry solely within the customary group of which they consider themselves a part.

The customary rules determining how a marriage is formed vary widely across groups but share common characteristics, many of which reach back many centuries.<sup>3</sup> At root, customary marriage marks not the joining of two individuals but the joining of two families or two kinship groups and is a vehicle for ensuring the continuation of the male's family line. In nearly all groups, the groom or members of his family enter into highly stylized negotiations with the parents of the bride and agree on an amount of bridewealth, called *lobolo*, *bogadi*, and various other names (hereafter, *lobolo*), that the groom will convey to the parents of the bride. In the past, the *lobolo* was nearly always paid in cattle. Today the parties nearly always agree on a sum of money, though the amount is still commonly determined by the current cost of a certain number of cows. The equivalent of several hundred American dollars would be a common figure. That is a very large sum for most black South African men in their twenties.

Upon payment of all or part of the *lobolo*, the performance of ceremonies that vary widely, and, in some groups, a period of

cohabitation or the birth of a child, the couple is considered married within their customary group. They were never, however, considered “married” under the laws of South Africa. Instead, they were treated as partners in a mere “customary union,” which was a legally recognized relationship that carried consequences for pensions, taxation, and so forth, but civil “marriage” was accorded higher legal status.<sup>4</sup>

Just as the rules of *lobolo* were determined by customary law, so too were most of the consequences of a customary marriage.<sup>5</sup> As a broad generalization, in nearly all these groups, a woman upon marriage became a part of the husband’s family and shifted from living under the control of her father to living under the control of her husband, her mother-in-law, and the head of her husband’s family. Any children of the marriage became part of the husband’s family. She had no power to enter into contracts or to own property in her own name. She could appear in a tribunal only through her husband or the head of her husband’s family. Her husband was free to marry additional women, but she was not free to marry additional men. If a wife left the marriage, her parents would usually be expected to repay or return all or part of the *lobolo*, and any children would remain with the husband or his family. If she outlived her husband, she would not inherit his property. Rather, a male member of his biological family—his oldest son, his brother, his father—was considered the only appropriate heir, though the heir was obliged to provide in some way for the widow. In some groups, the widow was expected to marry another male member of her husband’s family, especially if she had not yet borne any children. This was the custom of levirate marriage.

The cornerstone of the customary marriage system is the *lobolo* transaction. *Lobolo* retains positive and complex meaning to most black Africans, including most urban black Africans.<sup>6</sup> It stands variously as a symbol that the wife is valued, as a mark of the bond between families, as compensation to the bride’s parents for the cost and effort to raise her, and, today, as a symbol of continuity with African traditions. For married women, it remains an important source of status in both rural and urban areas, despite the fact that some practices, such as levirate marriage, grow out of a view that the husband’s fam-

ily, through the payment of *lobolo*, has acquired the woman's reproductive capacity (yet another "meaning" of *lobolo*).

Do women who live in rural customary groups today lead lives of subordination and degradation? That is a difficult question to answer, not solely because of the difficulty of deciding what should count as a degrading life. I have done no empirical work of my own in the rural areas, and though many studies have been written about the experiences of black South African women, few are available that are recent and methodologically rigorous.<sup>7</sup> It is certainly easy to find accounts from the twentieth century of women who saw themselves as having been "sold" by their fathers to an older man they did not know, who experienced intercourse with him as a physical violation, and who were treated much like a servant.<sup>8</sup> At the same time, most accounts of women's lives are mixed but more positive. H. J. Simons, one of the most thoughtful white South African observers of customary practices, believed that in circumstances in which rural husbands and wives lived in an extended family of the husband's, most women, while not equals, were at least "junior partners in a joint family enterprise."<sup>9</sup> The system of rules, when it worked, ensured that no woman was without a man responsible for her well-being. And, during the marriage, especially after bearing children, women typically exercised considerable authority in the operation of their households. The beleaguered new wife became the powerful mother-in-law a generation later. Customary unions continued to be potentially polygamous, but fewer and fewer men could afford second wives.

By the mid-twentieth century, however, large numbers of black Africans no longer lived in rural settings or in extended family arrangements, and the practice of male control of wealth no longer matched many urban or rural women's lives or needs. Many black women lived in cities and worked in the labor force—primarily as domestic workers—were paid directly by their employers, and controlled the income they earned. Large numbers of rural men worked in the cities or mines and provided neither support nor protection for their wives who remained in the country. Polygamy was frequently a warped parody of its earlier form: many men took a wife in the country,

then moved to the city, leaving wife and children behind, and married again.

By moving to the cities, many women (and young men) largely evaded the control of the male elders, but many rural women still suffered under the old practices. Some stayed in marriages they wanted to leave because of pressure from their fathers, who sided with their husbands and who did not want to return *lobolo*. Others were left without resources on the death of their husbands when a male relative of the husband claimed the family assets but failed to provide for the widow's care. Moreover, the tradition of male dominance, coupled with the decline of extended family living arrangements, has probably contributed to the extremely high levels of physical abuse to which African men subject their wives.<sup>10</sup>

To be sure, among white South Africans married under civil law, it is equally debatable whether wives experience the equality in their relationships that the official rules now proclaim. In South Africa as elsewhere, white men earn more than white women, and neither British nor Afrikaner South African men are known for egalitarian attitudes toward marriage. Still, by the 1990s, married women were formal equals under the common-law rules but not under the customary practices.

#### DOMINANCE AND TOLERANCE

The story of the positions South African colonial settlers took toward customary rules and practices during the nineteenth and twentieth centuries is far too complex to relate in a short essay.<sup>11</sup> As a broad generalization, the British and Afrikaner settlers regarded black African marital practices as barbaric—at worst, *lobolo* as a transaction in which a man sold his daughter into slavery, polygamy as uncurbed lust—but in the end colonial and settler governments generally tolerated the practices because, in a context in which blacks greatly outnumbered whites, tolerance was consistent with efficient administration.<sup>12</sup> The British secured the reluctant loyalty of the chiefs by protecting the chiefs' authority. The chiefs in turn applied the customary rules to their peoples, who provided an inexpensive source of labor to white farmers and households. As stated

by Theophilus Shepstone, architect of the British policy in Natal, "The main object of keeping natives under their own law is to ensure control of them. You cannot control savages by civilized law."<sup>13</sup>

As part of their system of control, the British government created special "native" courts to apply customary law in disputes between black South Africans. In some parts of the country, the customary rules were codified by British lawmakers, who learned the rules from chiefs and other headmen and rendered them into English legal language that was often inaccurate in translation and often more male-centered than actual practice.<sup>14</sup> Courts routinely applied these codified customary rules, but, even so, there were limits on the degree to which they were willing to give such rules legal effect. In each of the ordinances and statutes that authorized courts to apply customary laws in suits between blacks, a proviso always directed the court not to do so when it found a particular custom "repugnant to the general principles of humanity recognized throughout the whole civilized world"<sup>15</sup> or "opposed to the principles of public policy or natural justice."<sup>16</sup> In addition, the same courts refused to treat women within customary unions as wives for purposes of certain common law and statutory benefits. For example, unlike a wife in a civil marriage, a customary spouse could not collect from certain statutory insurance funds on the death of her husband in a motor vehicle accident.<sup>17</sup>

By the late twentieth century, courts rarely invoked the repugnancy clauses and Parliament had extended some statutory benefits of civil marriage to spouses in customary unions. The unions of rural black people were accepted as "marriages" by all the people who mattered to them, and, for most, the state recognized their relationship in the few contexts in which it made any difference. Unlike the U.S. government in its campaign against the Mormon church in the late nineteenth century, the whites in South Africa, however brutal their policies, never declared polygamy a crime for people living in customary unions, never prosecuted and imprisoned thousands of polygamists or drove thousands of others into hiding, and never sought to remove the children of polygamous parents on the grounds that their practices were inherently harmful.<sup>18</sup>



## THE NEW CONSTITUTIONAL ORDER

After World War II, the Afrikaner-led National Party won control of South Africa's government and, over time, imposed its apartheid policy of rigid segregation. Blacks ceased to be citizens of South Africa. Those who were needed by whites for labor were forced to live as migrants at the mines or in all-black townships outside the cities, and those who were not needed were relegated to "homelands" ruled by black leaders who were in large part puppets of the South African government. In 1994, after years of internal struggle and international condemnation, the National Party agreed to relinquish control to the black majority. Parliament adopted a new constitution, called the Interim Constitution, hammered out between the National Party and the African National Congress (ANC) with the participation of other smaller parties, and the homelands were reabsorbed into South Africa. The promulgation of the Constitution led directly to the elections in 1994 in which black South Africans, voting for the first time, brought a black-controlled government into power. Two years later, in 1996, a Final Constitution was adopted, drafted by a committee of Parliament dominated by the ANC.

The Interim and Final Constitutions sound many themes—individual freedom, human dignity, universal suffrage, reconciliation between racial groups, a parliamentary system of government—but no theme is sounded more forcefully than that of equality. That is hardly a surprise given the nation's sordid history. Somewhat surprising to many, however, is that the new constitutions emphasize equality based on sex as strongly as they do equality based on race. The prominent place of sex equality grew out of the ANC's adoption in the 1960s of Western human-rights ideology as well as the participation of South African women and women's groups in the anti-apartheid liberation efforts and in the negotiations over the Constitution.<sup>19</sup>

As completed, the Interim Constitution opens with these words:

In humble submission to Almighty God,  
We, the people of South Africa declare that—  
WHEREAS there is a need to create a new order in which all South  
Africans will be entitled to a common South African citizenship in

a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms . . .

Similarly, the first substantive section of the Bill of Rights in the Final Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law,” and continues by declaring that neither the state nor any person may: “. . . unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>20</sup>

The Constitutions’ drafters were well aware of the potential impact of the equality clauses on the gender-based family rules of the customary groups. So too were the traditional leaders. In the deliberations, the leaders advocated that customary rules, and particularly customary family rules, be treated as a separate system of laws exempt from the Constitution.<sup>21</sup> The chiefs and other traditional leaders argued that traditional ways, tolerated but demeaned during apartheid, deserved to be embraced in a new black nation.

As eventually adopted, however, the Interim and Final Constitutions took a quite different approach to the customary leaders and customary rules. The drafters—though many considered themselves members of the customary groups—held less positive views than the chiefs about the customary rules and about the chiefs themselves. Many of the new black members of Parliament viewed themselves as fortunate to be city dwellers today, free of the day-to-day control of their male elders. Many of the new members who were women dismissed the traditional leaders’ call for a revival of African identity and customs as a ruse to justify the continued repression of black women.<sup>22</sup> Moreover, many ANC members, including many black members, had spent the previous three decades condemning appeals to ethnic affiliations, because the white apartheid government had exploited such appeals to divide black South Africans against themselves.

In the eyes of the ANC, many of the tribal leaders themselves stood in a morally ambiguous position. Many were viewed simply as old men selfishly protecting their own power and as social conservatives out of step with progressive ideas. The version of customary law they defended was, in the views of many, inauthentic, distorted in the last century by the interaction of patriarchal black male elders and patriarchal white male colonial judges and administrators. Worse, many leaders had, before and during the apartheid era, entered into a Faustian bargain with the white government, under which they were permitted to retain control over the members of their groups only so long as they refrained from supporting the ANC efforts to overturn the existing regime. A few of the traditional leaders in Parliament had been celebrated opponents of apartheid, but others, many of whom were members of the Zulu-dominated Inkatha Freedom Party, were seen by the ANC as collaborators with the white rulers.

Thus, in the end, the Final Constitution, adopted by a black-majority Parliament, reflects a mixed view of blacks' own traditional cultures. On the affirming side, the Final Constitution declares that the country's official languages, formerly Afrikaans and English, were now to be "Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu."<sup>23</sup> The Constitution further guarantees to all the right "to participate in the cultural life of their choice" and directs courts to "apply customary law when that law is applicable."<sup>24</sup> It even provides that "the institution, status, and role of traditional leadership, according to customary law, are recognized."<sup>25</sup> On the other hand, the Constitution simultaneously makes customary rules and the traditional leaders subordinate to Parliament and the Bill of Rights. Yes, all citizens have the right to participate in the cultural life of their choice, "but," continues the same provision, "no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights," and the traditional leadership may continue to hold their offices but "subject to the Constitution." And yes, courts are to apply customary law, but they are to do so "subject to the Constitution and any applicable legislation that specifically deals with customary law." Customary law, that is,

may be changed by Parliament as freely as it can change judge-made common law or its own prior legislation.

Given these constitutional provisions, it may appear that the old gender-based customary family rules must be rejected today as unconstitutional, inconsistent with the equality clause of the Bill of Rights. And perhaps the new Constitutional Court will someday so hold. But remember that the Constitution does not prohibit all discrimination, only discrimination that is "unfair."<sup>26</sup> And even "unfair discrimination" (an elusive notion under the court's early jurisprudence)<sup>27</sup> will be tolerated if the state can demonstrate that a discriminatory regulation comes within the terms of a general limitations clause in the Constitution that permits restricting any of the rights in the Bill of Rights "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."<sup>28</sup>

#### THE RECOGNITION OF CUSTOMARY MARRIAGES ACT OF 1998

In November of 1998, four years after coming to power, Parliament adopted new legislation regarding customary marriage. The legislation was developed for Parliament by the South African Law Commission, a government agency long in existence but reconstituted under the new government. The commission in turn appointed a project committee that developed the proposal. When the committee began its work, the members agreed that "customary unions" entered into in the past would be relabeled as "marriages." No more separate and unequal. About marriages entered into in the future, however, the commission was more uncertain how to proceed and received many suggestions from academics and groups. At the extremes, two quite different models were available.

The committee might have recommended that Parliament adopt a single national law of marriage that prescribed for all South Africans the requirements and consequences of marriage, just as nearly all states in the United States have a single statutory form of marriage. Couples would be free to conduct their marriage ceremonies any way they wished—the delivery of cattle, an exchange of vows in church, a feast of goat, a five-

tiered cake, whatever—but the requirements of a legally valid marriage, the registration system and the legal effects of marriage, would be the same for all. As the new uniform law, Parliament might have cast into statutory language the rules of one of the customary groups or some amalgam of customary rules. Or it might have adopted for everyone the existing civil law under which whites and Christian blacks typically married.

Such an approach was conceivable, but the committee never seriously considered it. No one set of rules could be acceptable to all groups. Each customary group was proud of its practices and would not have given them up lightly for some other customary group's rules. Zulu practices could not be privileged over Xhosa, or Xhosa over Zulu. By the same token, South African Christians would have found unacceptable any system in which a husband could have more than one wife.

The second idea was simply to declare that all unions and marriages were henceforth considered marriages and, for the future, leave to each couple to choose the marital regime under which they wished to be united. All systems would be recognized as equal, and the state would enforce the rules of the marital system chosen by the couple or empower the tribunals of the group to enforce those rules. This, roughly speaking, is the approach that has been taken in Israel regarding Islamic and Christian marriages.

This approach had much more appeal to the committee. It was also the approach that the chiefs and other traditional leaders of the customary groups wanted. But it was one that, in its purest form, was unacceptable to many liberals and feminists, both black and white, for in their view many of the customary rules bearing on married women were intolerable and unconstitutional. In fact, some women had fought for the gender equality language in the Constitution as much to secure equal rights at home as to secure equal rights in the public sphere.<sup>29</sup>

In the end, the committee and commission, after receiving written comments from a large number of individuals and groups, recommended a middle course—and Parliament in turn accepted the commission's recommendations.<sup>30</sup> As adopted, the first substantive section of the act—called the Recognition of

Customary Marriages Act of 1998—declares that all customary unions entered into in the past are relabeled “marriages” and that, for the future, all customary marriages that comply with the provisions of the act are valid. The rest of the act regulates the content of customary marriage. Three themes dominate. The first is to ensure that each partner truly chooses to marry. Marriage must be with “consent.” The second is to declare women and men formal equals within the marriage relationship. In the absence of a prenuptial contract, spouses in customary marriages will be treated as holding property equally as community property. Married women are given the power to acquire and dispose of assets, to enter into contracts, and to litigate in their own names. The final theme is to inject the state bureaucracy into the regulation of customary marriages, first by requiring that all marriages be registered with a government agency and second by permitting divorce only when it is granted by a family court judge. The judge will divide the couple’s property, award alimony where appropriate, and decide which parent is the more appropriate custodian for the children.

Within this structure, some important aspects of customary marriage are permitted to continue. Most significantly, the customary groups are free to retain *lobolo* as a condition of a valid marriage. In addition, child marriage can still occur if a group’s rules permit it and if, in the particular case, the child “consents” and both parents concur. Levirate marriage—the widow’s marrying of her late husband’s brother—can still occur as long as the widow consents. And even polygyny is permitted to continue as long as the interests of the first wife are protected. A man may have a valid second marriage during the course of a first marriage as long as he enters into a written contract with his first wife fairly dividing the property accrued to that point and persuades a family court, after a hearing, that the contract is equitable to everyone concerned.

How much of customary marriage remains? If *lobolo* is the heart of customary marriage, customary marriage still has its heart. If polygyny is of symbolic importance even if in decline, it too survives. From another perspective, however, the new act maintains the trappings of customary marriage but empties it of most of its content. Women are now the formal equals of men.

Customary courts no longer have any formal authority to resolve disputes. The act replaces a patriarchal view of marriage with a partnership view. Even the polygamy provision is structured to make sure that the first wife or wives get their full share of the partnership out of the marriage up to that point. And, although customary courts may perform mediation, they cease to have any formal authority to order a resolution of a marital dispute.

#### DEMOCRACY AND THE RECOGNITION OF MINORITY CULTURES

Two quite different views might be taken of the process that produced this revolutionary legislation and of the substance of the act itself.

The first would be to regard it simply as a healthy example of democracy in action. Writing thirty years ago, Simons believed that in the face of the changes wrought by a market economy, both polygamy and *lobolo* had outlived their original protective and communal functions and ought to be reformed or abolished, but he also believed that "Africans themselves, and not an all-white legislature, should bring about the change."<sup>31</sup> The new law is, to use Simons's term, genuinely a work of "Africans themselves."<sup>32</sup> The majority of the members of the new Parliament are black. If they are married, *lobolo* was almost certainly negotiated. The act can thus be seen as law reform from the inside, by a legislature elected by all the people, including the rural black people most affected by it. Indeed, some black South Africans regard Mandela, Mbeki, and the other black Parliament members as the democratically elected successors to the hereditary chiefs.

The content of the act can also be defended substantively as paying just the right level of tribute to tradition. Most black South Africans, both women and men, accept the ceremonies and financial transactions associated with becoming married that are preserved by the new legislation. The social meanings of these transactions are changing with time and are less oppressive today to women than in the past. On the other hand, the act appropriately repudiated the old limitations on married women's capacities to contract, inherit, hold land in their own

names, and appear in court. These rules not only constricted women's position within the home and family but also curtailed women's dealings with third parties not part of their group. They were also the rules whose historic authenticity had been most discredited and whose boundaries today are most contested in the daily lives of the members of the groups. The new law thus enables black urban and rural women to enter into marriage through the familiar *lobolo* rituals that they accept, while empowering them as legal equals in the private and public sphere. Over time, *lobolo*, like the engagement ring in Western cultures, may be transformed into a symbol simply of affection, commitment, and respect.

A second view of the new legislation is quite different in that it regards it as the suppression of minority cultures. The customary groups are now a nonurban minority of the population who did not genuinely exert a voice in the legislation. As a formal matter, the Parliament of South Africa, like the Parliament of some other democracies, is not elected by districts. Each party creates a nationwide list of candidates, voters cast one vote for their party of choice, and each party gets a number of seats in Parliament roughly equal to the percentage it receives of the total vote. A considerable majority of the ANC members of Parliament are urban dwellers.

Of course, urban Parliament members might seek the views of rural people and adopt legislation that serves their needs, but Parliament in adopting this legislation relied on the Law Commission, and the commission in turn had little systematic information about the opinions of rural dwellers. Many rural residents will welcome the legislation as adopted, but others will not. It is not the old men alone who believe in the traditional ways. In much of Africa, rural women are the community's most rigorous enforcers of customs that appear to outsiders to subjugate women.<sup>33</sup> From the point of view of some practitioners of customary rules, the passage of the Recognition of Customary Marriage Act must contain a bitter irony: for two hundred years, white governments oppressed black people but at least permitted them to practice their old family ways; no sooner did a black-controlled government take over than it gutted its peoples' own traditions—"recognition" by eviscera-



tion. Patikile Holomisa is a member of Parliament, a traditional chief, a controversial politician, and president of the Congress of Traditional Leaders. After the drafting of the Final Constitution, he lamented, "Such is the tragedy of postcolonial Africa that, after attainment of freedom, its political leaders find it easy, convenient, and acceptable to adopt the political system of their erstwhile oppressors and yet find it difficult and problematic to restore indigenous forms of rule."<sup>34</sup> In his view, the black ANC members of Parliament had swallowed feminist and liberal ideologies foreign to Africa and inimical to its way of life. To him, the Parliament members were much like the British judges of a century before who had rejected some customary marriage practices as "repugnant" to civilized society.

As Holomisa's critique suggests, the new legislation dishonors the customary groups in a more fundamental way than by simply changing the substantive rules of marriage. It also changes who makes the decisions about the rules, for the system of customary rules rested on living practice, with the traditional leaders influencing its shape through their role as resolvers of disputes. They were lawgivers. The new legislation takes the decision about the content of rules out of the fluid process of living practice and takes the job of judging out of the hands of the traditional leaders.

Which view of the legislation is more accurate? That it was the sound product of a sound process? Or that, whatever the end result, the process inappropriately slighted the autonomy of traditional groups? The slighting, if it occurred at all, surely did not exceed the reach of Parliament's powers under the new Constitution. The Constitution explicitly makes customary law subject to change by Parliament. On the other hand, Parliament might have chosen to accord the customary groups and their leaders more deference than it did, in recognition of the fact that the Constitution also explicitly recognizes the "status and role of traditional leadership," directs courts to apply "customary law," and proclaims the freedom of individuals to participate in the cultural lives of their choice. A reasonable reader of these sections might infer that the drafters had something more in mind than simply preserving old forms while draining them of content.

What if Parliament had adopted a recognition act that actually recognized customary rules in their totality and left it up to the groups themselves to make changes from within over time? And what if the customary courts, not the government courts, had been entrusted with the initial responsibility of protecting married women from "unjust discrimination" under the Constitution?<sup>35</sup> Might this approach have produced over time an egalitarian version of marriage consistent with the new constitutional regime but more consistent with the honoring of traditional groups and practices? I am not at all certain that it would have, but here are some reasons for having given it a try.

Thandabuntu Nhlapo, a member of the South African Law Commission who served as the liaison between the commission and Parliament on customary marriage legislation, wrote an article a few years before the act's passage that suggests a basis for concern about the approach his own commission and Parliament took. In the article, he strongly criticizes the operation of the existing customary rules as they applied to women, but worries that "total abandonment of these [traditional] values may pose an even greater threat to social cohesion by creating a cultural vacuum in circumstances in which there are no ready substitutes."<sup>36</sup> He worries about treating women as independent when they are not yet independent in fact. Consider as a single example the widow who asserts her newly created property rights on the death of her husband but who, in doing so, offends the husband's family. She may gain a short-term benefit from the community property at the price of a long-term loss of the links to the husband's clan.<sup>37</sup>

Yet another ground for leaning toward reform from within is provided by Justice Albie Sachs of South Africa's new Constitutional Court, a person who has written and thought a great deal about customary law.<sup>38</sup> Sachs gave a speech in which he expressed confidence in the capacity of customary law to evolve to address new social problems. He spoke of what he considered the core notions of customary law that deserve to survive:

The deep principles of social respect, coupled with the all-embracing processes involving listening and hearing . . . of reintegration of defaulters and delinquents into the community, of attempting always to restore equilibrium . . . At the heart of traditional Afri-

can legal concern is a sense of human solidarity, of regard for all. No one is cast out or left by the wayside.<sup>39</sup>

He believed that many surviving customary rules, "formalized and frozen by magistrates, missionaries, and patriarchal male elders in the colonial and apartheid era," were unfit for the current circumstances of African women and particularly African widows, but called not for substantive remedial legislation but for a revitalization of customary law that would return it to its roots. "It is important," he said, "that democracy not be regarded as a blunt instrument that clubs customary law on the head." He reported on his observations during eleven years of exile in Mozambique. (He was an ANC partisan whose arm was mangled by a bomb planted by the South African police in an assassination attempt.) There, he recalled, a newly democratic government valiantly created "community courts" made up of "people of standing" in the locality. The judges sat in panels of three or more, at least one of whom was a woman. The panels dealt with family issues with informed wisdom, reaching "fair and practical" results. Sachs did not recommend exactly the same approach for South Africa, but sought the help of his audience in designing new institutional arrangements with comparable promise.

If Sachs's ideas had been at the heart of the legislation, the traditional leaders in South Africa might have been nudged to include women in decision-making and to respond in new ways to women's and children's needs for new forms of economic protection in an era in which men are not always nearby to provide support. They might have learned that new rules are needed to make certain that women and children are not "cast out or left by the wayside." Barbara Oomen, a Dutch anthropologist who has been studying rural black life in the village of Hoepakranz in the Northern Province over the last few years, recently related the story of Rosa Diphofa, a single mother who wanted a plot of land of her own to build a home.<sup>40</sup> She "had read in the papers" that women were now entitled to land on the same basis as men. Though she was unable to speak for herself at the chief's court, an uncle spoke there on her behalf. The chief, Rosa reported, was "most surprised" by her claim

but, after a “big discussion” with his advisors about the new rights, granted her request. Rosa was proud of her achievement:

His decision went through the village like a bushfire. . . . The women, especially the single ones, were very happy for me and helped me with the money from the Credit Club—1100 rands—to buy corrugated iron sheets. . . . They have helped me with the construction. People were very surprised that I knew how to build a mud wall but I just sat down, thought about it, and started. All the time I felt this strength. Now there are other women who will also ask for land.

Even without an altered perception of women’s entitlements, the chiefs might have had a pragmatic incentive to foster change in order to encourage women to choose to marry under customary rules at a time when rural women are gradually becoming able to exercise other choices. In urban areas, customary practices have already begun to change. A recent empirical study of black Africans living in urban townships near Pretoria found that today at the dissolution of a marriage, *lobolo* is rarely returned to the husband even when the woman is “at fault,” and children typically remain with their mothers.<sup>41</sup>

As an American outsider, I find an intuitive appeal in leaving to each customary group the task of negotiating change internally. The old rules protect the status of men, but men were expected to bear significant responsibilities for their families—their wives, their children, and their brothers’ children. Might not internally generated changes to provide for women and children have commanded more respect and adherence from those to whom they apply and left the rural women who pressed for them with more real power in their communities? Moreover, might not the changes that occur reflect more understanding of local needs than bureaucratic courts applying uniform rules of community property? In some ways the claims for leaving changes up to the groups themselves are little different from the traditional arguments that are made in the United States for leaving family law rules up to the states rather than the federal government—the arguments for government closer to the governed.

Having said all this, I admit that I thoroughly distrust my intuitions. I have a typical liberal American's preference for protecting diversity without an adequate appreciation of the circumstances of the people who are stuck with living these diverse lives.<sup>42</sup> My version of change may well be romantic and implausible. The Recognition of Customary Marriages Act probably rests on a realistic assessment by the ANC that the men who are customary leaders are simply unlikely to be willing to share power with women or to transform and revitalize customary rules in the ways that Sachs expects. Few chiefs will respond like the chief in Hoepakranz. Moreover, internal reform would inevitably stretch over many years. A virtue of the act as adopted is that it gives property rights and other protections to women who marry now and who, especially in the rural areas, cannot realistically demand to marry under civil law. These women have been subordinated by whites and by black men for many centuries and have waited too long for equality before the law.

Of course, whether these rights that are due to them "now" under the act will actually accrue to the women for whom they are intended is a different question. The experience in America suggests that statutory reform in family law rarely produces much immediate change in behavior within people's homes. That experience is particularly likely to be repeated in South Africa where Parliament, which has passed much forward-looking legislation in the last few years, has often been unable, in a faltering economy, to provide the financial resources and infrastructure necessary to make new programs come to life.<sup>43</sup> The Recognition of Customary Marriages Act was adopted over a year ago. It has not yet been implemented. No registration system is in place. Family courts have not yet begun to hear divorces in cases of customary marriages. Indeed, in many rural areas, no accessible family courts exist.

When I asked people who had been involved in the legislative process whether they thought men and women would comply with the legislation, I got varying responses. Several thought that most couples would fail to register their marriages (and, indeed, the act itself, recognizing this probability, provides that failure to register shall not affect the validity of a customary

marriage). Only one person to whom I spoke believed there was any likelihood that the sorts of men who currently enter polygynous marriages would comply with the requirement of coming to court for approval before taking a second wife. And few thought that most women or men married under customary law would, upon breaking up, petition a court for a divorce, even if there were a court nearby. For most black Africans in rural areas, it is possible that, for the near future at least, life will go on pretty much as it has. Changes in practices will occur over time not because of a statute, not because of courts, but because of the pressures of the market economy and the images of an outside world that rural people increasingly see. If this is so, the customary groups may obtain the opportunity that Parliament thought it had rejected of reforming the old practices from within.

ENDNOTES

<sup>1</sup>See John Comaroff and Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: University of Chicago Press, 1981); Anthony Costa, "The Myth of Customary Law," *South Africa Journal of Human Rights* 4 (1998): 525.

<sup>2</sup>The Matrimonial Property Act of 1984. For a summary of the treatment of women under civil law, see Felicity Kaganas and Christina Murray, "Law and Women's Rights in South Africa: An Overview," in Murray, ed., *Gender and the New South African Legal Order* (Kenwyn: Juta, 1994), 15–16.

<sup>3</sup>The description of customary rules that follows is drawn from Thomas W. Bennett, *Application of Customary Law in Southern Africa* (Cape Town: Juta & Co., 1985), 137–182; Bennett, *Human Rights and African Customary Law* (Cape Town: Juta & Co., 1995); South African Law Commission, *Harmonisation of the Common Law and the Indigenous Law: Customary Marriages* (Pretoria: The Commission, 1997); Harold Jack Simons, *African Women: Their Legal Status in South Africa* (Evanston, Ill.: Northwestern University Press, 1968), 68–183.

<sup>4</sup>Thus, for example, a person in a customary union could invalidate the union by entering into a civil marriage with someone else, but not vice versa. Bennett, *Application of Customary Law in Southern Africa*, 172–182.

<sup>5</sup>See again the sources cited in note 3.

<sup>6</sup>Iain Currie, "The Future of Customary Law: Lessons from the Lobolo Debate," *Acta Juridica* (1994): 146; M. W. Prinsloo, G. J. van Niekerk, and L. P. Vorster, "Perceptions of the Law Regarding, and Attitudes Towards, Lobolo in Mamelodi and Atteridgeville," *De Jure* 31 (1) (1998): 86–89.

<sup>7</sup>Many fine books exist that describe the lives of South African rural women. See, e.g., Rebecca Hourwich Reyher, *Zulu Woman: The Life Story of Christina Sibiya* (New York: Columbia University Press, 1948); Mark Mathabane, *African Women: Three Generations* (New York: HarperCollins, 1994); Patricia Romero, "The Autobiography of Nongenile Masithathu Zenani," in Romero, ed, *Life Histories of African Women* (London: Ashfield Press, 1988), 7–47; Romero, *Profiles in Diversity: Women in the New South Africa* (East Lansing: Michigan State University Press, 1998); and Belinda Bozzoli, *Women of Phokeng: Consciousness, Life Strategy, and Migrancy in South Africa, 1900–1983* (Portsmouth, N.H.: Heinemann Educational Books, 1991). Extremely interesting work has been conducted recently in three villages in South Africa's Northern Province by Dutch anthropologist Barbara Oomen. Preliminary reports of the work are available at <<http://ict-law.leidenuniv.nl/group/JFVVI/www/oomen.htm>>.

<sup>8</sup>Reyher, *Zulu Woman: The Life Story of Christina Sibiya*.

<sup>9</sup>Simons, *African Women: Their Legal Status in South Africa*, 15, 64.

<sup>10</sup>Kaganis and Murray, "Law and Women's Rights in South Africa: An Overview."

<sup>11</sup>See Isaac Schapera, *A Handbook of Tswana Law and Custom*, 2d ed. (London: Oxford University Press, 1955); Comaroff and Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context*; Simons, *African Women: Their Legal Status in South Africa*; Bennett, *Application of Customary Law in Southern Africa*.

<sup>12</sup>Britain's practice of openly recognizing and enforcing customary rule began in Natal in the 1840s. Simons, *African Women: Their Legal Status in South Africa*, 19–26.

<sup>13</sup>*Ibid.*, 28.

<sup>14</sup>K. L. Robinson, "The Minority and Subordinate Status of African Women under Customary Law," *South Africa Journal of Human Rights* 11 (1995): 457, 460.

<sup>15</sup>Royal Instruction of 8 March 1848.

<sup>16</sup>The Black Administration Act of 1927, sec. 11(1).

<sup>17</sup>See *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v. Fondo*, 1960 (2) SA 467 (A).

<sup>18</sup>See Gustive O. Larson, *The "Americanization" of Utah for Statehood* (San Marino, Calif.: Huntington Library, 1971), 99–100, 181–183, 213–216; Martha Sonntag Bradley, *Kidnapped From That Land: The Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993); see also *In re Black*, 283 P2d 887 (Utah 1955).

<sup>19</sup>See Christina Murray and Catherine O'Regan, "Putting Women into the Constitution," in Susan Bazilli, ed., *Putting Women on the Agenda* (Johannesburg: Ravan Press, 1991), 33, 36–41; Catherine Albertyn, "Women in the Transition to Democracy in South Africa," in Murray, ed., *Gender and the New South African Legal Order*, 39. Women's groups pre-

sented to the Constitution's negotiators a Women's Charter for Effective Equality. See Penelope E. Andrews, "Striking the Rock: Confronting Gender Equality in South Africa," *Michigan Journal of Race and Law* 3 (2) (Spring 1997): 307, 324.

<sup>20</sup>Constitution for the Republic of South Africa (1996), sections 9(1), 9(3).

<sup>21</sup>Iain Currie, "Indigenous Law," chap. 36 in Matthew Chaskalson et al., *Constitutional Law of South Africa* (Kenwyn, South Africa: Juta & Co., 1996), 36-3.

<sup>22</sup>Speech by Nozi Routledge-Madlala at a symposium on Customary Law and Gender, Johannesburg, 3 November 1997. Ms. Routledge-Madlala was a member of Parliament and chair of the ANC Women's Caucus. See also S. Hassim, "Family, Motherhood, and Zulu Nationalism: The Politics of the Inkatha Women's Brigade," *Feminist Review* 43 (1993): 1.

<sup>23</sup>Constitution for the Republic of South Africa (1996), section 6(1).

<sup>24</sup>*Ibid.*, sections 30 and 211(2), respectively.

<sup>25</sup>*Ibid.*, section 211(1).

<sup>26</sup>The Constitutional Court has decided no cases challenging the constitutionality of customary rules. The one significant lower court decision in which a challenge was made to customary family laws held that the customary rule that permits only men to inherit was "discriminatory," but it was not "unfair" to a widow because the inheriting male had an obligation to provide for the widow. See *Mtembu v. Letsala*, 1997 (2) SA 936.

<sup>27</sup>In the context of sex discrimination, see the opinions in *President of the Republic of South Africa v. Hugo*, 1997 (6) BCLR 708 (opinions of Justices Goldstone, Kriegler, Mokgoro, and O'Regan).

<sup>28</sup>Constitution for the Republic of South Africa (1996), section 36.

<sup>29</sup>See Murray and O'Regan, "Putting Women into the Constitution," 39, 40.

<sup>30</sup>South African Law Commission, *Harmonisation of the Common Law and the Indigenous Law: Customary Marriages*.

<sup>31</sup>Simons, *African Women: Their Status under the Law of South Africa*, 84 (speaking of polygyny). As for *lobolo*, he wrote: "But no change will be effective, nor should any be attempted, without the support of African opinion and that will be obtained only when Africans are able to manage their own affairs." *Ibid.*, 96.

<sup>32</sup>This is the position taken eloquently by Victoria Bronstein in "Reconceptualizing the Customary Law Debate in South Africa," *South Africa Journal of Human Rights* (3) (1998): 388, 402-405.

<sup>33</sup>E.g., Romero, "The Autobiography of Nongenile Masithathu Zenani."

<sup>34</sup>Patikile Holomisa, speech to the Northern Province Council of Churches, 23 May 1997.

<sup>35</sup>This approach, if taken, would have been much like that taken in the United States in a somewhat different context: the application of the U.S.



Constitution's Bill of Rights on Indian reservations. A federal statute creates a bill of rights for reservation Indians, but, as interpreted by the U.S. Supreme Court, leaves the enforcement of these rights up to the tribal courts. *Martinez v. Santa Clara Pueblo*, 436 US 49 (1978).

<sup>36</sup>Thandabuntu Nhlapo, "Women's Rights and the Family in Traditional and Customary Law," in Bazilli, ed., *Putting Women on the Agenda*, 111, 116.

<sup>37</sup>This example comes from a conversation with Likhapa Mbhata, a senior researcher with the Gender Project at the Centre for Applied Legal Studies, Johannesburg, October 1999.

<sup>38</sup>See, e.g., G. Welsh, F. Dagnino, and A. Sachs, "Transforming Family Law: New Directions in Mozambique," in Alice Armstrong, ed., *Women and Law in Southern Africa* (Harare, Zimbabwe: Zimbabwe Publishing House, 1987).

<sup>39</sup>Address to the Southern African Society of Legal Historians, 13 January 1999, at 12.

<sup>40</sup>Barbara Oomen, "'We Want to Secure Our Hope': Women and Land Rights in South Africa," in Madeleine Maurick and Bram Posthumus, eds., *Women Challenging Society: Stories of Women's Empowerment in Southern Africa* (Amsterdam: Netherlands Institute for Southern Africa, 1999).

<sup>41</sup>See Prinsloo et al, "Perceptions of the Law Regarding, and Attitudes Towards, Lobolo in Mamelodi and Atteridgeville."

<sup>42</sup>For example, I admire Michael Walzer, *On Toleration* (New Haven: Yale University Press, 1997).

<sup>43</sup>E.g., the government has had difficulty implementing new legislation regarding land redistribution and compensation for those who were the victims of crimes of the white government during apartheid.